INDEX

PAGE

Statement and History of the Case ---------- 1

Statement of the Case ---------- 3

Answer ---------- 3

Cross-Petition ---------- 4

Evidence:

Testimony of:

Thomas C. Vaughn ---------- 6
Charles K. Scruggs ---------- 7
Lemen ---------- 6
A. D. Hudspeth ---------- 7
Knox L. Garvin ---------- 7
H. H. Wegner ---------- 8

Argument and Authorities ---------- 9

Conclusion ---------- 62

Authorities Cited:

Abbey Land & Imp. Co. v. San Mateo, 167 Cal. 434, 139 Pac. 1068 ---------- 20
Armour & Co. v. State of North Dakota, 240 U. S. 510, 36 Sup. Ct. Rep. 440 ---------- 46
Auto Transit Co. v. Fort Worth (Tex.) 182 S. W. 685 ---- 33
Bandini Petroleum Co. v. Superior Court, (Cal.) 293 Pac. 899 at 905 ---------- 28
Geo. Bolln Co. v. North Platt Valley Irrigation Co., 19 Wyo. 542, 121 Pac. 22 ---------- 31
Cardinal, Ex parte, (Cal.) 150, Pac. 348 ---------- 33, 40
Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 52 Sup. Ct. Rep. 559 ---------- 59, 60
City of Baltimore v. Radecke, 49 Md. 217 ---------- 19
City of North Muskogee v. Miller, 249 Mich. 52, 227 N. W. 743 ---------- 23
Continental Oil Co. v. City of Twin Falls (Ida.) 286 Pac. 353 ---------- 21

Page

Thomas Cusack Co. v. City of Chicago, 242 U. S. 526, 37 Sup. Ct. Rep. 190, 61 L. ed. 472, L. R. A. 1918A----45
Dawson, In re 136 Okla. 113, 277 Pac. 226 ----29
Dickey v. Davis, (W. Va.) 85 S. E. 781 ----33, 40
Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. Rep. 18, 49 L. Ed. 169 ---- 16
Ferguson-Hendrix v. Fidelity & Deposit Co., 79 Wash. 528, 140 Pac. 700 ---- 33
Fuller Brush Brush Co. v. Town of Green River, 60 Fed. (2d) 613 ---- 55
Gant v. Oklahoma City, 15 Pac. (2d) 833 ----47
Gant v. Oklahoma City, 6 Pac. (2d) 1065 ----47
Gant v. Oklahoma City, 150 Okla. 86, 6 Pac. (2d) 1065--31
Grand Rapids & I. R. Co. v. Osborn, Commr. 193 U. S. 17, 24 Sup. Ct. Rep. 310 ----44
Gribben, In re, 5 Okla. 379, 47 Pac. 1074 ----21
Hadfield v. Ludin, 98 Wash. 657, 168 Pac. 516----33, 40, 41
Harrigan & Reed Co. v. Frank Burton, et al, 224 Mich. 564, 195 N. W. 60, 33 A. L. R. 142 ----31
Helmerich & Payne v. Roxanna Petroleum Corp. (Kan.) 14 Pac. (2d) 663 ----60
Herkness v. Irion 11 Fed. (2d) 386 ----60
Winkler v. Anderson, (Kan.) 177 Pac. 521, 3 A. L. R. 28 ---- 60
Hodge Drive It Yourself Company v. Cincinnatti, 123 Ohio State 284, 175 N. E. 196, 77 A. L. R. 889 (Affirmed U. S. Sup. Ct. 1/4/32 in 284 U. S. 335, 52 Sup. Ct. Rep. 144) ---- 41
Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. Ed. 780 ---- 19
Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139----18
Italia Amer. Shipping Corp. v. Nelson, 323 Ill. 427, 154 N. E. 198 ---- 33
Jitney Bus Association v. Wilkes-Barre, 256 Pa. 462,100 Atl. 954 ---- 33
Julian Oil & Royalties Company v. Capshaw, 145 Okla. 237, 292 Pac. 841 ----26, 60
Kelso, In re 147 Cal. 609, 82 Pac. 241 ---- 22
Koneszny v. Railway Co., 128 N. W. 1096 ----31

Page

Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. Ed. 385 ---------- 17
Leavy v. U. S. 177 U. S. 621 ---------- 31
Lehon v. City of Atlanta, 242 U. S. 53, 37 Sup. Ct. 70 ---- 42
Lutz v. City of New Orleans, 235 Fed. 978 ---------- 33, 40
Magnolia Petroleum Co. v. Wright 124 Okla. 55, 254 Pac. 41 ---------- 31
Magnolia Petroleum Co. v. Wright, 124 Okla. 55, 254 Pac. 41 ---------- 25, 31
Marblehead Land Company v. City of Los Angeles, 47 Fed. (2d) 528 ---------- 28, 55, 60
Marrs v. City of Oxford, 24 Fed. (2d) 541 ---------- 31, 60
Mondou v. N. Y. N. H. & H. Ry. Co., 223 U. S. 1, 32 Sup. Ct. Rep. 169 ---------- 39
Mueller v. Oregon, 208 U. S. 412, 28 Sup. Ct. Rep. 324 ---- 31
Nectow v. City of Cambridge et al., 277 U. S. 183, 48 Sup. Ct. Rep. 447, 72 L. Ed. 842 ---------- 19
New Orleans v. Le Blanc, 139 La. 113, 71 Sou. 248 ------ 33
Ohio Oil Co. v. Indiana, 20 Sup. Ct. Rep. 576, 177 U. S. 190 ---------- 60
Opinion of Justices, In re (N. H.) 129 Atl. 117 ---------- 33
Otis & Gassman v. Parker, 187 U. S. 606, 23 Sup. Ct. Rep. 168 ---------- 57
Ownes v. Corporation Commission, 41 Fed. (2d) 799 ---- 43
Oxford Oil Co. v. Atlantic Oil & Producing Co., 16 Fed. (2d) 639 (Affirmed 32 Fed. [2d] 134) ---------- 60
Pacific Palisades Association v. City of Huntington Beach, (Cal.) 237 Pac. 538 ---------- 22
Packard v. Banton, 264 U. S. 140, 44 S. Ct. 257 ------ 40, 41
Pa. Coal Co. v. Mahon, 260 U. S. 293, 43 Sup. Ct. 158, 67 L. Ed. 322 ---------- 19
People v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438 ---------- 21
Reagan v. Trust Co. 154 U. S. 362, 14 Sup. Ct. Rep. 1047 -- 18
Reinman v. City of Little Rock, 237 U. S. 171, 35 Sup. Ct. Rep. 511 ---------- 45, 54
Rissman & Son v. Industrial Commission, (Ill.) 154 N. E. 198 ---------- 33
Smallwood v. Jeter, 42 Ida. 169, 244 Pac. 149 ---------- 33, 35

Page

Standard Oil Co. v. City of Marysville, 279 U. S. 582, 49 Sup. Ct. Rep. 430 ----41, 55
State v. Somnelson (Wisc.) 111 N. W. 712 ----33, 35
State v. Seattle Taxi Co. (Wash) 156 Pac. 837----33
State of Washington ex rel. Seattle Trust Co. v. Roberge, 278 U. S. 116, 49 Sup. Ct. Rep. 50, 73 L. Ed. 210----24
State v. Walter Bowen & Co., 86 Wash. 23, 149 Pac. 330 ---- 37
Tanner v. Little, 240 U. S. 369, 36 Sup. Ct. Rep. 379----28
Tindall, Ex parte, 102 Okla. 192, 229 Pac. 125 ----25
Throop, Ex parte, 145 Pac. 1029, 169 Cal. 93 ----19
Village of Terrace Park v. Errett, 12 Fed. (2d) 240 ----21
Village of Euclid v. Ambler Realty Co., 272 U. S 365, 47 Sup. Ct. Rep. 114, 71 L. Ed. 303 ----20, 29
Walcher v. First Presbyterian Church at Norman, 76 Okla. 9, 184 Pac. 106 ----17
Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 3 L. Ed. 220 ----17
Youngstown v. Kahn, 112 Ohio St. 654, 148 N. E. 842, 43 A. L. R. 662 ----21, 24
Zahn et al. v. Board of Public Works, et al., 195 Cal. 297, 234 Pac. 388 ---- 29
Zahn v. Board of Public Works, (Cal.) 234 Pac. 388 at 395 ----58, 59

Statutes Cited:

Section 3712 C. O. S. 1921 as amended by Session Laws 1929 Chapter 240, Section 1 ----43
Section 4547 C. O. S. 1921 (Sec. 6380 O. S. 1931)----9
Section 4562 C. O. S. 1921 (Sec 6395 O. S. 1931)----9
Section 1, Article I Charter of City of Oklahoma City----10
Section 3, Article I Charter of Oklahoma City ----10
Section 21 of Ordinance No. 3944 of Oklahoma City ----11
19 R. C. L. "Municipal Corporations", pp. 805 and 807, Sec. 113 ---- 13
19 R. C. L. Section 112 ----17
Chapter 178, 1923 Session Laws, Sections 6170-6179 O. S. 1931 ----11, 29

Number 547

Supreme Court of the United States

October 1932 Term

WALTER H. GANT, KNOX L. GARVIN AND A. D. HUDSPETH, APPELLANTS,

vs.

CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION, and J. W. VAN METER, APPELLEES.

BRIEF OF APPELLEES

STATEMENT OF HISTORY OF CASE

This case was begun by the appellants as plaintiffs in the District Court of Oklahoma County, Oklahoma, on October 2, 1930, by the filing of a petition for an injunction against the City of Oklahoma City, a municipal corporation, and J. W. Van Meter, Building Superintendent of said City. The plaintiffs, by this petition, sought to enjoin the defendants in the enforcement of the bond provisions of the oil drilling ordinance, which provision required the filing of a bond of $200,000.00, to be executed by some "bonding or indemnity company authorized to do business in the State of Oklahoma."

The defendants filed an answer and cross-petition in which they asked for an injunction against the plaintiffs by reason of their

failure to file such bond, and the case proceeded to trial. The trial court denied the plaintiffs any relief on their petition and sustained the defendants in their cross-petition, granting the defendants a temporary injunction against the plaintiffs from drilling an oil well upon the premises, by reason of the failure of the plaintiffs to file such bond.

From this order granting the defendants a temporary injunction against the plaintiffs an appeal was taken to the Supreme Court of the State of Oklahoma, where the judgment of the trial court was affirmed. *Gant et al.* v. *Oklahoma City*, 150 Okla. 86, 6 Pac. (2d) 1065.

From this ruling of the Supreme Court of Oklahoma the plaintiffs prosecuted an appeal to the Supreme Court of the United States, which was dismissed for want of jurisdiction (52 S. Ct. Rep. 203, 284 U. S. 594).

The original case then came on for hearing in the District Court of Oklahoma County, Oklahoma on application for permamanent injunction and after full trial the trial court again denied the plaintiffs any relief and rendered judgment upon the defendants' cross-petition, permanently enjoining the plaintiffs from proceeding with the drilling of a well on said property.

From this judgment the plaintiffs prosecuted an appeal to the Supreme Court of Oklahoma, where the judgment of the trial court was again affirmed, 15 Pac. (2d) 883, (------Okla.------) The appeal from this last decision is now lodged in this Court for determination.

STATEMENT OF THE CASE

The appellants have set out an abstract of the pleadings; however we desire to more specifically call attention to the allegations of the appellees' answer and cross-petition. Omitting the formal parts this pleading is as follows (R. 4-7):

ANSWER

"Come now the defendants, the City of Oklahoma City, Oklahoma, and J. W. Van Meter, and for answer to the petition of plaintiffs filed herein, state:

"1. That said petition fails to state facts sufficient to constitute a cause of action in favor of plaintiff and against these defendants.

"2. That the petition shows on its face that the plaintiffs made application to the city, and were granted a permit to drill a well on the property set out in the petition of plaintiffs, conditioned that the plaintiffs comply with the ordinances and execute a bond as provided by the ordinances of the City of Oklahoma City, and especially Section 21 of Ordinance No. 3944, being an amendment to Chapter 22 of the General Ordinances of 1928, and commonly known as the drilling provision of the zoning ordinance, and that the plaintiffs sought the benefits of said ordinances insofar as they might operate in favor of plaintiffs, and now seek to destroy the provision which they do not desire to comply with, and by reason thereof, the plaintiffs, and each of them, are estopped to maintain this action.

"3. That the plaintiffs show by their petition that they have not exhausted the adequate remedy at law provided by Chapter 178, Session Laws of 1923, and Chapter 22, Revised Ordinances 1928 of said City, and therefore, they are not entitled to maintain this action.

"4. The defendants deny generally and specifically each, every and all the material allegations in said petition contained."

CROSS-PETITION

"Come now the defendants, the City of Oklahoma City, and J. W. Van Meter, as Superintendent of Buildings for said City, and for their cross-action against the plaintiffs, allege and state:

"1. That the plaintiffs, Garvin and Gant, is a partnership composed of Knox L. Garvin and Walter H. Gant, the said Knox L. Garvin being a resident of Stephens County, Oklahoma, and the said Walter H. Gant, being a resident of Carter County, Oklahoma; and the plaintiff A. D. Hudspeth is a resident of Oklahoma City, Oklahoma.

"2. That the defendant, the City of Oklahoma City, Oklahoma, is a municipal corporation existing under and by virtue of the laws of the State of Oklahoma under a charter duly adopted and approved, as provided by law.

"3. That prior to the_____day of_____, 1930, the plaintiffs made application to the Building Commissioner of the City of Oklahoma City for a permit to drill an oil or gas well on Block 9, Meads Addition to the City of Oklahoma City, which said application was denied and from which the said plaintiffs appealed to the Board of Adjustment of said City, pursuant to Chapter 22, Oklahoma City General Ordinances of 1928, and amendments thereto. That said appeal was heard, and on the 15th day of September, 1930, the Board of Adjustment, aforesaid, made an order granting to the plaintiffs the right to obtain a permit for the drilling of one oil and/or gas well on Block 9, Meads Addition, aforesaid, and in addition thereto made certain other orders in connection with said property and the drilling of said well, and in addition thereto ordered that the plaintiffs comply with all ordinances and regulations of said City and all terms of all ordinances then in force or thereafter put in force in said City relating to the drilling, operation and maintenance of a well upon said property for which said permit was granted, a copy of said order is hereto attached and made a part hereof, and marked 'Exhibit A'.

"That after the granting of said order the plaintiffs went

upon said property without obtaining a permit and without comlying with the ordinances of the City, as hereinafter set out, and did commence the active drilling, and is now engaged in the active drilling of said well, and the defendant, the City of Oklahoma City, is informed and believes and, therefore, charges that the plaintiffs have drilled said well to a depth in excess of ----------feet and are about to penetrate the oil or gas bearing horizon or sand, without having obtained a permit and without having complied with said ordinances of said City in relation to the drilling, operation and maintenance of said well in this:

"That the plaintiffs have failed to obtain a permit from the Building Superintendent pursuant to the order of the Board of Adjustment.

"That the plaintiffs have failed and neglected to execute a bond in the amount of Two Hundred Thousand Dollars ($200,-000.00) conditioned that the plaintiffs will pay and discharge any liability imposed by law for damages on account of injury to property, either private or public, or bodily injury, including death, received or suffered by an person or persons, firm or corporation resulting from the drilling, operation or maintenance of said well or structures incident thereto.

"Wherefore, these defendants pray that the court restrain the plaintiffs, and each of them, their servants, agents and employees, from drilling or continuing the drilling of said well upon said property until the plaintiffs have complied with the ordinances of said City and obtained a permit and executed a bond, as required by said ordinances, and that upon final hearing the temporary order be made permanent, and that these defendants have such other, further and additional relief to which it may be entitled in the enforcement of said ordinances."

EVIDENCE

The appellants have set out an abstract of the evidence, however we desire to call attention to some additional testimony of the witnesses, as shown by the record.

The witness Lemen testified that this location of the well on Block 9, Mead's Addition, was less than one-half mile from some stores and that there were certain railroad buildings about 300 yards from the well (R. 10); that the location itself was about one mile from the City Hall (R. 24); that between the City Hall and a point one-half mile from the well the City was built up with valuable business and wholesale buildings (R. 26); that within that area were located the Santa Fe and M. K. & T. depots (R. 27); that the prevailing winds in Oklahoma City were from the south and southeast, the City Hall being to the north and west of this location (R. 27-28); and, further, that if the Mary Sudik well, which had been out of control for a period of days, had been on this Block, 9, Mead's Addition, that the entire business section of the City would have been covered with oil (R. 27).

The witness Thomas C. Vaughn further testified that there were 574 wells in the Oklahoma City field, 21 of which were within the City limits; that 12 wells in the field had been beyond control (R. 29), and that 2 of them had been on fire while flowing and out of control (R. 31). He further testified that the Mary Sudik well in the local field during the time it was out of control and flowing had sprayed oil for about 2 miles, and another well, the Sigmon, had sprayed oil for a mile or more. He further testified that as long as the human element was to be dealt with in the drilling of wells that it could not be said with any degree of certainty that any well would not get out of control; that if such happened to a well in Block 9, Mead's Addition, that it would necessarily be

a greater hazard because of its proximity to the business district of the City than would a well further removed from the business district (R. 34-35).

The witness Charles K. Scruggs also testified that his company made the same requirement with regard to bonds for an individual or independent operator and the "so-called major companies" and that this was true with reference to all of the surety companies of which he had knowledge. (R. 39.)

The witness A. D. Hudspeth recognized the human element in the drilling and operation of oil wells and the hazards incident thereto through negligence of those in charge (R. 45).

The witness Knox L. Garvin testified that he had made application to the Building Commissioner for a permit to drill this well, which had been denied, and on appeal to the Board of Adjustment it had been granted conditioned upon the filing of bond; that he had complied with all of the requirements of the ordinance except as to the matter of posting the surety bond required (R. 52-53). He further testified that all wells within the City were being drilled under bonds required by the ordinance (R. 58-59); that there were within the U-7 or drilling zone of the City, and within the City limits, approximately twelve to fifteen hundred acres; that of that area probably fifty per cent was settled up with residences, business and industry (R. 56). It was further shown by the testimony of this witness that in his offer to post a personal bond no principal sum of such bond was discussed nor was a definite bond tendered (R. 54).

The witness Bradford further testified that there is no certainty that threads on the valves would not become worn and that if there is any negligence in caring for such portions of the drilling outfit that a well would get beyond control (R. 71). He further testified that there had been 2 wells beyond control and running wild within the last six months (R. 70-71), and, further, that he had never seen a state inspector inspecting any wells within the City limits (R. 72).

The witness H. H. Wegner testified that he was a drilling contractor and that if a well came in like the Mary Sudik well at the location in question that it would be a hazard and that a well like the Stamper Number 3 on fire would probably set fire to a house within a distance of three or four hundred feet (R. 75-76).

The witness Smith, although a witness for the appellants, admitted that the human element was to be considered in reference to hazards in drilling for oil or gas (R. 77-78).

We have called attention to this additional testimony in order to point out to the Court the fact that each witness recognized the hazard which would be created by negligence on the part of anyone engaged in the drilling or operation of a well. This is a matter of which the Court will take judicial notice, as we will point out further in this brief.

ARGUMENT AND AUTHORITIES

The City of Oklahoma City, as a municipality of the State and an arm or department of the State Government, may rightfully exercise the general police powers of government. In addition to those general powers, the statutes of Oklahoma have specifically conferred certain powers, and it might be interesting to note some sections of the statute. Among other provisions we find Section 4562, C. O. S. 1921; Section 6395 O. S. 1931, regarding protection against fire, as follows:

> "4562. PROTECTION AGAINST FIRE. The council may regulate the construction of, and order the suppression of and cleaning of fireplaces, chimneys, stoves, stovepipes, ovens, boilers, kettles, forges or any apparatus used in any building, manufactory or business, which may be dangerous in causing or promoting fires, and prescribe limits within which no dangerous or obnoxious and offensive business may be carried on.
>
> "The council may also prescribe limits within which no buildings shall be constructed except of brick, stone or other incombustible material, with fireproof roof, and impose a penalty for the violation of such ordinance; and may cause buildings commenced, put up or removed into fire limits, in violation of such ordinance, to be removed or abated. * * *"

Other powers are given and duties prescribed by Section 4547, C. O. S. 1921, Section 6380 O. S. 1931, under the head of "General Powers" of the city, said section being as follows:

> "4547. GENERAL POWERS. The mayor and council shall have the care, management and control of the city and its finances, and shall have power to enact, ordain, modify or repeal any and all ordinances not repugnant to the laws of the United States and the constitution and laws of this state, as they shall deem expedient and for the good government of the

city, the preservation of the peace and good order, the suppression of vice and immorality, and the benefit of trade and commerce, and the health of the inhabitants thereof, and such ordinances, rules and regulations as may be necessary to carry such power into effect. * * *"

The City of Oklahoma City exists under a charter form of government, and under the unanimous holdings of our courts the courts take judicial knowledge of the provisions of the City charter. We call attention to Section 1, Article I of the charter of the City of Oklahoma City, which provides, in defining the organization and powers of the City:

"Section 1. * * * And it shall have such other powers, rights, privileges, franchises and immunities as are granted and conferred by any other parts of this charter or by the constitution and laws of the State of Oklahoma."

Then in Section 3 of Article I of this charter, it is provided further:

"Section 3. GENERAL GRANT OF POWER. Said City shall also have all other powers that may hereafter be given it by the Constitution and the laws of this state; * * * and said City shall have power to enact and enforce all ordinances necessary to protect health, life and property and to prevent and summarily abate and remove nuisances and to preserve and enforce good government and order for the security of the city and its inhabitants, to protect the lives, health and property of the city; and to enact and enforce all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the general laws of this state, the State Constitution or this charter."

Thus we see that the City does have all powers conferred upon cities under the general laws of the State, as well as the express

powers given it by the provisions of the charter, neither being exclusive, and the charter powers being in no way inconsistent with the powers conferred by the statutes.

Section 21 of Ordinance No. 3944, which is under attack here, is a portion of the comprehensive drilling ordinance passed by the City as an amendment to the zoning ordinances of the City. The State Legislature in 1923 passed a law specifically authorizing cities to make zoning regulations. This statute is Chapter 178, 1923 Session Laws, Sections 6170-6179, O. S. 1931. We call particular attention to the following sections:

> "6170. MUNICIPAL CORPORATIONS—POWER TO REGULATE BUILDINGS. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."
>
> "6171. DISTRICTS—REGULATIONS AND RESTRICTIONS TO BE UNIFORM—TELEPHONE EXCHANGES EXCEPTED. For any or all of said purposes, the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this Act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in the other districts. Nothing in this section shall be construed, to apply to telephone exchange buildings."
>
> "6172. REGULATIONS—PLANS. Such regulations shall be

made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air, to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

"6178. VIOLATIONS OF ACT MAY BE ENJOINED. In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained or any building structure or land is used in violation of this Act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality, or any other persons affected thereby, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the unlawful occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises."

"6179. EFFECT OF CONFLICTING ORDINANCES—RAILWAYS EXCEPTED FROM ACT. Wherever the regulations under authority of this Act require a greater width or size of yards, courts or other open spaces, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this Act shall govern. * * *"

We call attention to these sections of the statutes of the State and the provisions of the charter of the City of Oklahoma City in order that the Court may be advised as to the general statutory and

charter provisions. However, we do not understand that the appellants question the power of the City to make these regulations generally, with reference to the drilling of oil wells, within the City limits.

We note the statement in the plaintiffs' petition, as called attention to in the last paragraph on page 5 of the appellants' brief, wherein they allege that they were at all times "ready, willing and able to make and file with said appellee City, a bond conditioned as required by said ordinance, with good and sufficient personal sureties thereon." Thus, we now understand, and have understood throughout this case, that they do not question the right of the City to require a bond in the sum of $200,000.00, but only question the right of the City to require that the surety shall be a "bonding or indemnity company authorized to do business within the State of Oklahoma."

The appellants confine their arguments to one proposition, i. e. that this section of the City ordinance violates Section 1, Article 14 of the Constitution of the United States, Section 2, Article 2 of the Constitution of the State of Oklahoma, and Section 7, Article 2 of the Constitution of the State of Oklahoma, and is, therefore, void.

We have carefully read the appellants' brief filed herein and apparantely appellents rely upon the contention that the requirement of this ordinance, with reference to the surety on the bond, is an unreasonable exercise of the police power. Excerpts from 19 Ruling Case Law, "Municipal Corporations," pages 805 and 807, are

set out at pages 20 and 21 of the appellants' brief. We desire to quote the whole of Section 113, beginning at page 807 of this work, as a statement of what we understand to be the true rule as to the *determination of reasonableness* of laws and ordinances:

> "113. DETERMINATION OF REASONABLENESS. In determining what is reasonable, much must depend upon the requirements of different localities, the density of population of the town in which the ordinance has been enacted and the dangers and evils prevalent therein, and what would be reasonable in one place might be highly unreasonable in another. A municipal ordinance should not be looked upon by the courts with as much respect as the enactment of a co-ordinate department of the government of the state, but none the less a court should not strike down a municipal ordinance as unreasonable merely because it disagrees with the wisdom or expediency of the ordinance or the policy which it reflects. It is well settled that when an ordinance is passed relating to a matter which is within the legislative power of the municipality, all presumptions are in favor of its validity, and when it is attacked the burden is on the party alleging its invalidity to establish that fact. Thus when the validity of an ordinance depends upon the existence of one or more facts at the time of the enactment thereof, the existence, and not the nonexistence, of the necessary facts to sustain the validity of the ordinance, should be presumed, in the absence of evidence to the contrary. So also a municipal ordinance will be presumed to be reasonable unless the contrary appears on its face or is established by evidence. If an ordinance is found to be partial and unequal in its operation as between different classes; if it is manifestly unjust; if it discloses bad faith; if it involves such oppressive or gratuitous interference with the rights of the citizen as can find no justification in the minds of reasonable men, the court might well say that the legislature never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense and in this sense only, that the question of unreasonableness can properly be regarded. An ordinance

is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."

From a careful reading of this section we find that the courts, in determining the reasonableness of an ordinance, apply certain rules. First, the court will study the conditions and requirements of the particular locality, having in mind that there is no definite rule as to reasonableness, and an ordinance unreasonable in one place might be reasonable in another. Second, the courts will not strike an ordinance down merely because it disagrees with the wisdom or expediency of the ordinance, or the policy which it reflects. Third, when an ordinance passed is within the legislative power of the municipality the court will indulge in all presumptions in favor of its validity. Fourth, the burden of establishing its invalidity is upon the one who attacks it. Fifth, it is only when the ordinance is found to be partial or unequal in its operation, manifestly unjust, or passed through bad faith, or when it can find no justification in the minds of reasonable men, that the court will hold the ordinance unreasonable.

We accept this as the true rule by which ordinances of this character should be measured, and having these rules in mind we maintain that the appellants have not sustained the burden upon them and that this ordinance should be sustained. It will be noted that there is no allegation or proof of either bad faith or fraud.

It will be interesting to note the cases cited on behalf of the ap-

pellants. At the outset, let us state that we do not question, nor disagree, with the rule as stated in most of these cases, however, they can, without exception, be distinguished as not applicable to the case at bar.

Dobbins v. *Los Angeles*, 195 U. S. 223, 25 S. Ct. Rep. 18, 49 L. Ed. 169, is first relied upon. We submit that this case has no application to the case at bar, and we note where the court specifically found that the ordinance "was not demanded by the public welfare," and that it was not passed as an exercise of the police power in the interest of the public, but had for its object the destruction of the plaintiff's rights and the building up of another company. We quote from the court's finding as follows:

> "* * * No reasonable explanation for the arbitrary exercise of power in the case is suggested. The narrowing of the limits within which the plaintiff in error, in compliance with the ordinance of the city and the permit of the board of fire commissioners, was proceeding to erect the gasworks, to the smaller and more limited section, was not demanded by the public welfare, and, taking the facts as alleged in the bill, seems rather to have been actuated by the purpose to exclude the plaintiff in error from further prosecution of the enterprise. The limits of the privileged district were fixed late in August. In September the complainant began the construction of the works. In November, without changed conditions or adequate reason, the council, by an amended ordinance, draw a line embracing a part of the district including the complainant's property, and declare that, too, shall be prohibited territory. This action is strongly corroborative of the allegations of the bill that the purpose was not police regulation in the interest of the public, but the destruction of the plaintiff's rights, and the building up of another company still within the privileged district after the passage of the amendment * * *."

In *Lawton* v. *Steele*, 152 U. S. 133, 14 S. Ct. Rep. 499, 38 L. Ed. 385, the rule was stated by this Court and the ordinance upheld as a proper exercise of the police power.

To the same effect is *Walcher* v. *First Presbyterian Church at Norman*, 76 Okla. 9, 184 Pac. 106, where the court upheld the police power of the city in passing an ordinance for the regulation of laundries and prohibiting them within 150 feet of any church, school or hospital, saying (in the second syllabus):

> "It is not depriving one of his property without due process of law for a city, acting under its police and sanitary powers, to regulate by ordinance a business deleterious to public health, morals, safety or welfare of its inhabitants."

The court quotes from 19 Ruling Case Law, Section 112, the authority cited above, and says:

> "A court passing upon an ordinance of regulatory nature in deciding whether it is reasonable can take judicial notice of matters of common knowledge and of changing conditions in manner of living. * * * Consequently, we find that, under the present well-known conditions, it is within the police powers of a city, looking to the public health, safety, and welfare of its inhabitants, to pass such regulatory ordinances as the one in question, and that such an ordinance is not unreasonable, arbitrary, or discriminating."

The case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. Rep. 1064, 30 L. Ed. 220 is next cited. This case is probably cited more than any other as an example of arbitrary legislation passed to to single out and unjustly discriminate against a particular class of Chinese laundries. The court found that the ordinance in question had no relation to the public health, peace or safety, but was ar-

bitrary, unreasonable and directed against a particular class, the court saying:

> "* * * No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions.
>
> The fact of the discrimination is admitted.
>
> "No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution. * * *."

We do not question the authority, nor the application of the rule to that case, but we call attention to the fact there is no evidence that could, in any way, make it applicable to the case at bar.

Reagan v. *Trust Co.*, 154 U. S. 362, 14 S. Ct. Rep. 1047, ----------L. Ed.----------, is next cited, where the court, in an exhaustive opinion on the question of rates, upholds the exercise of the police power.

Hopkins v. *Richmond*, 117 Va. 692, 86 S. E. 139, is next cited. In this case the court upholds the provisions of the law for segregation of races within the City of Richmond as a proper exercise of the police power.

City of Baltimore v. *Radecke*, 49 Md. 217, is next cited. This case, while upholding the general police power, held the particular ordinance bad because it gave the mayor an absolute right to prohibit the use of steam engines within the city after notice, without any fixed rules or regulations, and thus gave him an arbitrary power, not to regulate but to prohibit. The case has no bearing upon the issue involved in the case at bar.

Appellants next cite *Holden* v. *Hardy*, 169 U. S. 366, 18 S. Ct. Rep. 383, 42 L. Ed. 780. In this case the court upheld the police power in limiting labor in mines to 8 hours per day.

Ex parte Throop, 145 Pac. 1029, 169 Cal. 93, is next cited. In this case the court found that it was "plainly manifest that the attempted regulation of the business conducted by the petitioner has no relation to the ends for which the police powers exist namely to protect the public health, comfort, safety or welfare."

The appellants next cite *Pa. Coal Co.* v. *Mahon*, 260 U. S. 393, 43 S. Ct. Rep. 158, 67 L. Ed. 322, where the court determined under the peculiar circumstances of the case, that the law went beyond the limits of lawful regulation. It bears no relation to the present case, although recognizing the proper exercise of police power.

Nectow v. *City of Cambridge, et al.* 277 U. S. 183, 48 S. Ct. Rep. 447, 72 L. Ed. 842, is next cited. In this case the ordinance put the plaintiff's property in the residence zone. He objected and the court held that the provisions of the ordinance did not promote

health, safety or the general welfare and bore no relation to them, and being deterimental to the plaintiff was set aside. The court however upheld the general police powers, and cited with approval the case of *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. Rep. 114, 71 L. Ed. 303.

Abbey Land and Imp. Co. v. *San Mateo,* 167 Cal. 434, 139 Pac. 1068, is next cited. This was the case of an ordinance restricting the number of crematories within a certain area, and was held bad, the court saying:

> "(6) The neighborhood in which plaintiffs propose to erect and maintain a crematory is not of a character that requires its suppression or prohibition, even if it were inherently as injurious to public health or convenience as a cemetery. Four other cemeteries adjoin that of plaintiffs on its westerly side, and three more, among them the Cypress Lawn Cemetery, aforesaid, are in close proximity. There are few dwellings in the immediate vicinity and no buildings devoted to any business, except that of burying the dead. It is entirely clear that the operation of another crematory in that vicinity will be in no wise injurious to the public health, comfort, or convenience, and that it will not injure adjacent property. * * *
>
> "It is conceded, of course, that if a crematory is, or may be, operated in a manner which may cause injury to the public health, comfort, or convenience, the local legislative authority may make reasonable regulations of the manner of conducting it so as to decrease or prevent such injury. But considering its location, it cannot be claimed that this crematory cannot be conducted without public injury, nor that if erected and carried on in the usual way, or in the manner proposed by plaintiffs, it will constitute a public nuisance, or cause public injury. It is only when the public health, safety, convenience, or welfare is or may be jeopardized that the police power may be invoked for its protection by restriction or regulation of the private rights of persons and property. * * *"

Continental Oil Co. v. *City of Twin Falls* (Idaho) 286 Pac. 353, is next cited. While upholding the police power of the city, the court found, under all the facts and circumstances, that the ordinance was not a reasonable regulation, and in addition that it was discriminatory in that it did not apply to all business of the same class. Certainly there can be no question about the correctness of the rule and its application to that case.

The same is true of the next case cited—*Youngstown* v. *Kahn*, 112 Ohio State 654, 148 N. E. 842, 43 A. L. R. 662. The court found that the ordinance had "no relation to the public health, safety, morals and welfare and falls outside of the inherent police power of the municipality," saying, however:

> "A positive prohibition is imposed by the ordinance upon the erection of an apartment house upon residence territory within the district. Thus the owner is substantially deprived of the use of his property. If this deprivation is reasonably imposed to prevent the use of the property for any purpose directly detrimental to the public health, morals, or safety, such a restriction does not legally constitute a taking of property without compensation and without due process. This is true, for the reason that all property is held subject to the police power of the state, and the state has the inherent right to prevent a citizen from using his property in a way which is harmful to the public health, safety, or morals. 6 R. C. L. 201."

To the same effect is *Village of Terrace Park* v. *Errett*, 12 Fed. (2d) 240.

In Re Gribben, 5 Okla. 379, 47 Pac. 1074, and *People* v. *Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, are also cited, in which cases the court found that the ordinances were not

authorized by statute and were, therefore, beyond the power of the City to pass.

While we have shown that the ordinance in the case at bar was specifically authorized, both by the statutes of the State and the City charter, we understand that the authority of the City to legislate in the matter of regulating the drilling of oil wells is not even questioned by the appellants.

Re John Kelso, 147 Calif. 609, 82 Pac. 241, is a case in which the court held the ordinance bad because of an absolute prohibition against the use of the plaintiff's land for a quarry, depriving him of the right to get the stone from quarries upon the land. By reason of the peculiar facts and conditions the court held this to be unreasonable although it upheld the general power of the state to regulate the use of the land under the police power.

Pacific Palisades Association v. *City of Huntington Beach,* (Cal.) 237 Pac. 538, is next cited. In this case the sole question was whether the prohibition against the use of the land was arbitrary or reasonable, based upon the fair exercise of the police power. Under the peculiar facts of the case the court held that the ordinance went beyond the police power of the city, saying, however:

> " * * * While the use to which one may put his property may be restricted or regulated by the state in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, it is elementary that the enjoyment of the property cannot be interferred with or limited arbitrarily. *In re Kelso,* 147 Cal. 609, 611, 82 Pac. 241, 21 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178. It must be taken as very def-

initely settled in this state that the right to zone may be resorted too by municipalities upon a proper invocation of the police power. *Miller* v. *Board of Public Works* (Cal. Sup.) 234 Pac. 381; *Zahn* v. *Board of Public Works* (Cal.) 234 Pac. 388. But such zoning must be reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community. A municipality is not permitted under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business establishments and enterprises already situated in unrestricted districts. *In re White* (Cal. Sup.) 234 Pac. 396. The City of Huntington Beach has the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing. *Ex parte Hadacheck*, 165 Cal. 416, 420, 132 Pac. 584, L. R. A. 1916B, 1248. Ordinances having effect must be reasonable, and must be for the purpose of protecting the public health, comfort, safety, or welfare. Every intendment is to be made in favor of the lawful exercise of municipal power making such regulations, and it is not the province of courts, except in clear cases, to interfere with the exercise of that authority. * * *."

City of North Muskegon v. *Miller*, 249 Mich. 52, 227 N. W. 743, is next cited. While this case held certain provisions of the zoning ordinance bad as unreasonable and invalid, it upheld the oil drilling ordinance, saying:

"It seems unfortunate that if there is oil under this marshy land, it should not be made use of both for the benefit of plaintiff, as well as defendants. However, this is a matter which is purely administrative, and it is not within our province to regulate the action of the city officials when they act within their legal rights. We find the zoning ordinance illegal and void as to the particular section of the city in which this property is situated. We find the drilling ordinance both legal and reasonable, and in this instance the city council had a right to refuse the giving of a permit."

At page 49 of appellants' brief they cite *State of Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 49 S. Ct. Rep. 50, 73 L. Ed. 210. In this case a city ordinance restricted the location of a home for the aged poor within a certain territory without the consent of the owners of two-thirds of the property within 400 feet of the proposed building. The court held that from the particular local conditions this restriction had no relation to the police power and that the delegation of the right to the property owners in that vicinity to use arbitrary powers was bad. This is shown from the portion of the case quoted in the appellants' brief. The case is, therefore, not in point.

Thus it will be seen that in these cases relied upon by the appellants, where statutes and ordinances have been held bad, that they were either clearly unreasonably, arbitrary or passed without any relation to health, safety or public welfare under the valid exercise of the police power, and, as stated before, we do not disagree with the rule as laid down by these cases, but only in its application. Cases without number could be cited where the exercise of the police power is upheld.

As was said by the court in the *Youngstown case, supra*:

> "There is no difficulty in stating these principles. The difficulty arises in fitting these conceded principles to the facts before us."

In addition to the above we desire to quote briefly the following cases for statements as to the general exercise of the police power and the rights of legislative bodies in the exercise thereof.

See *Magnolia Petroleum Co.* v. *Wright*, 124 Okla. 55, 254 Pac. 41, where the court, in discussing an ordinance passed under the authority of the police power, said:

> "* * * Courts should be very cautious in declaring a municipal ordinance unreasonable; there being a peculiar propriety in permitting the inhabitants of a municipality to determine what rules are necessary for their own local government. *City of Tacoma* v. *Keisel*, 68 Wash. 685, 124 Pac. 137, 40 L. R. A. (N. S.) 757. It is democratic that each city or community should so far as practicable, determine its own standard of quietude and other conditions under the police power. This may vary in different communities. We do not deem the ordinance in question invalid as being unreasonable."

See also *Ex parte Tindall*, 102 Okla. 192, 229 Pac. 125, where the court in discussing the police power and its exercise, says (p. 130 Pacific Reporter):

> "(7) While the term 'police power' has never been specifically defined nor its boundaries definitely fixed, yet it may be correctly said to be an essential attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.
>
> "It may also be equally well said that its limitations are plastic in their nature and will expand to meet the actual requirements of an advancing civilization and adjust themselves to the necessities of our multiplying complexities in moral, sanitary, economic and political conditions. See R. C. L. pp. 187-197; 8 Cyc 863-876, 889-900, and authorities cited *supra*. No principle in our system of government will limit the right of government to respond to public needs and protect the public weal.
>
> "'The Fourteenth Amendment to the Constitution of the United State does not interfere with the proper exercise of

the police power of the several states.' 6 R. C. L. 194, p. 197 —citing more than a dozen decisions from the Supreme Court of the United States and numerous decisions from the Supreme Courts of various states. See also, authorities above cited in Cyc, C. J., and Black's Const. Law."

We quote from the case of *C. C. Julian Oil & Royalties Company* v. *Capshaw*, 145 Okla. 237, 292 Pac. 841, as follows:

"(3) Statutes such as those under consideration are based largely on the police power of the state; and while this power is more or less elusive and difficult to define, this difficulty results largely from the fact that it (the police power) is plastic in its nature and accommodates itself to every change of conditions which call for its application. Its nature and scope is well stated in R. C. L. Sec. 182, as follows:

' "The police power is an attribute of sovereignty possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written constitution. It has been said that the very existence of government depends on it, as well as the security of social order, the life and health of the citizen, and the enjoyment of private and social life and the beneficial use of property. It has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government.'

"The court in *Ex parte Tindall*, 102 Okla. 192, 229 Pac. 125, 126, in the sixth syllabus said:

" 'The police power is an attribute of sovereignty, inherent in every sovereign state, and not derived from any written Constitution nor vested by grant of any superior power.'

" 'The term "police power" comprehends the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal and protection of the public interests.

" 'It is plastic in its nature, and will expand to meet the ac-

tual requirements of an advancing civilization and adjust itself to the necessities of moral, sanity, economic, and political conditions.

" 'No principle in our system of government will limit the right of government to respond to public needs and protect the public welfare.'

"In this connection it cannot be disputed that the production of petroleum and its various products is one of the major industries of this state, and one in which many of its citizens are vitally concerned. The almost universal use of oil, gasoline, and other petroleum products, together with the fact that a major portion of the revenues to support our educational and eleemosynary institutions and other departments of state government is derived from taxes levied upon this industry, makes the conservation of this great natural resource a matter of grave concern to the state and every citizen thereof. Notwithstanding the magnitude and importance of the oil industry, it is one of the natural resources which is peculiarly susceptible to waste and dissipation, and when it once escapes can never be recovered.

* * * * * *

"In the case of *Marrs* v. *City of Oxford*, 24 F. (2d) 541, the Federal District Court upheld a city ordinance in the state of Kansas regulating the drilling upon town lots, and among others things held that oil and gas, while in the earth, were susceptible of only a qualified ownership (which is the rule adopted in this state, *Rich* v. *Doneghey*, 71 Okla. 204, 177 Pac. 86, 3 A. L. R. 252); but even if it be property in the strict sense, the right of a landowner to produce same is subject to the police power of the state, and that the owner must use this property so that he will not injure another, and that where the provisions of the ordinance were generally reasonable it would not be held invalid because better or more scientific provisions might be suggested. This case was affirmed on appeal. See (C. C. A.) 32 F. (2d) 134, 67 A. L. R. 1336 and petition for *writ of certiorari* was denied by the Supreme Court of the United States. See 280 U. S. 573, 50 S. Ct. 29, 74 L. Ed. 625."

We call the Court's attention to the recent case of *Marblehead Land Company* v. *City of Los Angeles*, 47 Fed. (2d) 528, where at pages 532-33 the Court said:

> "(3-5) The legislative body entrusted with the police power has a wide discretion which cannot be interfered with by the courts. Their laws or ordinances enacted in pursuance of the police power are invested with a strong presumption of validity. If the question as to whether or not the legislation is unreasonable or arbitrary or an unequal exercise of power is fairly debatable, the legislation must be upheld as valid.
>
> "(6-7). * * * The city council presumptively acted upon the theory that such a hazard was real and substantial * * *. In this connection it should be observed that, in passing up the conclusions of the trial court or the local legislative body, the appellate court should give great weight to the determination of local authorities and the local courts especially familiar as they are, with local conditions."

We quote from *Bandini Petroleum Co.* v. *Superior Court*, (Cal.) 293 Pac. 899 at 905, where the court, in quoting from earlier cases, said:

> " 'The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals.' *Ex parte Drexel*, 147 Cal. 766, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878. It is settled law that all property is held subject to the exercise of police power, and that provisions of the Constitution declaring that property shall not be taken without due process of law have no application in such cases. *Odd Fellows' Cem. Ass'n.* v. *San Francisco*, 140 Cal. 230, 73 Pac. 987."

See *also Tanner* v. *Little*, 240 U. S. 369, 36 S. Ct. Rep. 379, where this Court, speaking through Mr. Justice McKenna, said:

"The police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests."

Zoning ordinances have been upheld in most all states, including Oklahoma, following the cases of *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. Rep. 114, 71 L. Ed. 303, 54 A. L. R. 1016; *In re Dawson*, 136 Okla. 113, 277 Pac. 226; *Zahn et al.*, v. *Board of Public Works, et al.*, 195 Cal. 497, 234 Pac. 388.

Acting under the authority of the Act of 1923, Sections 6170, 6171, 6172, 6178 and 6179 O. S. 1931, *supra*, the City of Oklahoma City passed a comprehensive zoning ordinance, of which ordinance No. 3944 is an amendment. Under the general zoning ordinance every lot and parcel of ground within the City is classified for a particular use. The U-7 Zone was created and the drilling of wells for oil and gas was permitted therein, but "to secure safety from fire, panic and other dangers", as contemplated by the 1923 Act, and "to promote the general welfare" of its citizens certain regulations were prescribed, which should be complied with. These regulations are detailed in Ordinance No. 3944, attached as an exhibit to the record herein, and provided not only for the giving of a bond conditioned as provided, but also for the character of fittings and valves, boilers, distances between and the sizes of storage tanks, distances for the locations of wells from property lines, protection of the streets, protection of water courses, from which water was secured for domestic use, and numerous other requirements more specifically detailed therein.

This brief outline of the zoning ordinances shows that the municipality has enacted its regulations with the view to obtaining the most appropriate use of property consistent with the public safety and welfare. As heretofore stated, Block 9, Mead's Addition, is wholly within the U-7 or oil drilling zone of the City, where the recovery of oil and gas is expressly permitted.

The Court will thus see that there is no prohibition in the ordinance against the use of this property for the recovery of oil and gas as may lie beneath its surface. This clearly distinguishes this case from the cases urged by appellants in their brief and relied upon by them.

It will be seen that in the Dobbins case there was an absolute prohibition against the desired use of the property. Likewise, in the Throop case the city ordinance absolutely prohibited the operation of a stone crusher. In the Mahon case the court held that there was an absolute prohibition against the desired use, and likewise in the Nectow case.

The ordinance in controversy here is entirely different from the ordinances involved in those cases, in that the desired use of this particular property is permitted by the ordinance but there is attached to such permission conditions which the ordinance imposes looking to the safety and general welfare of the inhabitants of the City. One of these conditions is the requirement of a bond. It is the contention of the City that under the general grant of the police power, and particularly under the Act of 1923, *supra*, the City might impose any condition which would have a natural ten-

dency to promote the safety and welfare of the inhabitants of the City.

The court takes judicial notice of the fact that drilling of wells for oil and gas constitutes a hazard. As was said by the court in *Marrs* v. *City of Oxford*, 24 Fed. (2d) 541:

> "Common knowledge teaches that a slender derrick, 75 to 80 feet in height, is of some danger to surrounding buildings in case of a windstorm; there is a fire hazard connected with the production of oil and gas in immediate proximity to boilers, a hazard which is reflected by the public records of this state, which disclose heavy additional fire insurance rates on any structure within 50 feet of a drilling oil well; there is a discomfort to neighbors in the necessary noise attendant upon day and night drilling; allegations to the contrary are but conclusions, and may be disregarded."

The court will take judicial cognizance of all matters of general knowledge; see *Mueller* v. *Oregon*, 208 U. S. 412, 28 Sup. Ct. Rep. 324; of things affecting the public health; see *Leavy* v. *U. S.* 177 U. S. 621; of the disastrous effect of a forest fire; see *Koneszny* v. *Detroit Railway* Co., 128 N. W. 1096; of noises and disturbances caused by the operation of automobiles; *Magnolia Petroleum Co.* v. *Wright*, 124 Okla. 55, 254 Pac. 41, and of the dangers and hazards of oil drilling, *Gant* v. *Oklahoma City*, 150 Okla. 86; 6 Pac. (2nd) 1065.

Appellants, at pages 41 to 47, cite the cases of:

Harrigan & Reed Co. v. *Frank Burton, et al.*, 224 Mich. 564, 195 N. W. 60, 33 A. L. R. 142.

Geo. Bolln Co. v. *North Platt Valley Irrigation Co.*, 19 Wyo. 542, 121 Pac. 22,

for authorities against the requirement of a bond. If these cases are urged as authority against the right of the city to make provisions for bonds in a case like the case at bar, they would be rare exceptions and decidedly in the minority, for there runs through the cases which we cite the admitted authority for a bond requirement. However, a study of these particular cases will show that the statutes involved were declared invalid by reason of their unusual and peculiar provisions.

In the Geo. Bolln Co. case the legislative enactment was an effort to provide additional remedies growing out of contractual obligations. The holding of the case has no bearing on the requirements of the ordinance involved in the case at bar, where the reason for its enactment is an effort on the part of the municipality to conserve the safety, health and general welfare of the community.

In the Harrigan case the objection to the statute is well pointed out in the portion of the opinion quoted by appellants in their brief, where the court says that this was an effort "under the guise of police regulation" to arbitrarily and unreasonably interfere with the constitutional rights of the private citizen to pursue a lawful business or calling and to make contracts with others in relation thereto. It will be noted that the requirement for a bond was for the benefit of those with whom the principal on the bond dealt under private contract. In the case at bar the requirement for a bond is for the protection of the citizens of the community, who are helpless to protect themselves, against the hazards of drilling, if the city permits the drilling for oil and gas. The case is clearly distinguishable upon this ground.

Appellants cite, at page 48 of their brief, *Jitney Bus Association* v. *Wilkes-Barr,* 256 Pa. 462, 100 Atl. 954. This was evidently a case of first impression by the Pennsylvania Court, as no authorities were cited in the opinion. The case is decidedly in the minority as we shall see by a study of the authorities.

With reference to the reasonableness of the ordinance requirement that the bond be furnished by a surety company authorized to do business within the State of Oklahoma, we call the Court's attention to the following cases:

Lutz v. *City of New Orleans,* 235 Fed. 978;
Smallwood v. *Jeter,* 42 Ida. 169, 244 Pac. 149;
Hadfield v. *Lundin,* 98 Wash. 657, 168 Pac. 516;
State v. *Seattle Taxi Co.,* (Wash.) 156 Pac. 837, 90 Wash. 416;
Ex parte Cardinal (Calif.) 150 Pac. 348;
Dickey v. *Davis* (W. Va.) 85 S. E. 781;
In re Opinion of the Justices (N. H.) 129 Atl. 117;
Italia Amer. Shipping Corp. v. *Nelson,* 323 Ill. 427; 154 N. E. 198;
Ferguson-Hendrix Co. v *Fidelity & Deposit Co.,* 79 Wash. 528, 140 Pac. 700;
State v. *Somnelson* (Wisc.) 111 N. W. 712;
John Rissman & Son v. *Industrial Commission* (Ill.) 154 N. E. 198;
Auto Transit Co. v. *Fort Worth* (Tex.) 182 S. W. 685;
New Orleans v. *LeBlanc,* 139 La. 113, 71 So. 248.

In the Lutz case, *supra,* the City of New Orleans by ordinance required, as a condition for the operation of taxicabs upon its streets, the execution of a surety bond, conditioned as required by Ordinance No. 3944 herein. The same attack was made upon that

ordinance as in this case, and the court upheld the requirement, saying:

"* * * Considering the financial irresponsibility of plaintiffs alleged in the bill and the dangerous nature of the business as shown by the tabulated statement of accidents filed, the requirement of a bond to indemnify passengers and others who may be injured by the carelessness of the jitney operator is well in line with other statutes for the protection of passengers such as those referred to. Aside from these considerations the city contends for the validity of the ordinance as an exercise of its police power. In answer it is urged by the plaintiffs that the giving of bond would not tend to promote the safety of either the passengers or the public. The same objection was urged with regard to the Federal Employers Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, Sections 8657-8665]), but the Supreme Court held that any measure that would impel the carrier to avoid or prevent negligent acts would be a proper regulation of commerce. See Second Employers' Liability Cases, 223 U. S. pp. 50 51, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The same reasoning applies here. There can be no doubt that the safe operation of an automobile depends largely on the caution, skill and responsibility of its driver. Any measure that will tend to secure careful, competent men as drivers of jitneys will promote the safety of passengers and the general public. It is at once apparent that the requirement of a bond would have this effect. No one would be willing to become surety for a reckless or incompetent driver, and the fact that he was under bond, with his responsibility fixed would, of itself make the driver more careful. It would appear therefore, that the city could properly require the giving of a bond in the reasonable exercise of its police power.

"(7) Does the requirement that the bond be signed by a surety company violate plaintiff's liberty of contract? Assuredly not. It is shown that a number of surety companies are authorized to do business in the state. It is not shown they exact exorbitant fees, or that the plaintiffs could procure personal surety on a better basis or at all. The only reason plaintiffs

cannot procure the surety bonds in compliance with the ordinance is because they cannot deposit cash or collateral equal to the amount of the bond. Personal surety might make the same requirement. In any event the contrary is neither alleged or proved. Considering the greater desirability of corporate surety in any case, a superiority sometimes recognized by the law itself (see Bankrupt Act [Act July 1, 1898, c. 541, Sec. 50, 30 Stat. 558 (Comp. St. 1913, Sec. 9634)] bonds of trustees and referees), it can hardly be said that the provision that the bond must be signed by a surety company is more onerous than would be a requirement of personal surety of equal responsibility."

Note also the statement of the court in the Smallwood case, *supra*:

"(14) It would serve no useful purpose to discuss at length the power of the Legislature to limit the carrier to furnishing bonds of surety or insurance companies only. Modern experience has brought into existence the surety and bonding companies for almost unlimited purposes. The results of loss to insured persons through other than surety bonds, and the power of the state to control, and the regulations adopted for the purpose of control of, bonding and insurance companies, with the resulting security to the insured, are persuasive reasons supporting the wisdom of the Legislature, if it sees fit, to require that a bond be given by such insurance or bonding company. The power to require a bond necessarily implies the power to establish the qualifications of the bondsman. The requirement violates no constitutional right of plaintiff."

We quote from *State* v. *Somnelson*, *supra*, as follows:

"Our attention is called to *State of Ohio ex rel.* v. *Robins*, 71 Ohio St. 273, holding that a law requiring official bonds to be obtained of surety companies is unconstitutional as a restriction upon the liberty to contract. The case is quite novel and seems to stand alone, and rests upon reasoning which we are not willing to follow. It is not suggested that such a law violates any express provision of the Constitution but rather

that it violates the spirit thereof as contained in some general declarations referred to. It is not perceived why it is not within the scope of legislative authority, especially with regard to an office created by the legislature, to provide that the official bond of the officer elected or appointed to fill the office shall be by a surety company and at public expense."

See *Ferguson-Hendrix Company* v. *Fidelity and Deposit Company*, *supra*, We quote from the opinion as follows:

"(1) The appellant first contends that the act is unconstitutional, in that the bond is required to be executed by a surety company authorized to do business in the state, thus denying it the right to deposit money or to give personal security. We cannot yield our assent to this view. In *State ex rel. Beck* v. *Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. Rep. 681, a similar act was sustained. * * * The court, in a carefully considered opinion, said that the wisdom of the act was a legislative question; that the measure was a lawful regulation for the public good, a legitimate exercise of the police power of the state; that it was not class legislation; but that, on the contrary, it was framed to meet 'the crying evils which it was believed had grown up with this branch of business.' In *Clark's Estate*, 195 Pa. 520, 46 Atl. 127, 49 L. R. A. 587, the court sustained the contitutionality of an act authorizing a receiver, guardian, trustee, executor, or administrator, etc., required by law or order of the court to give bond as such, to include as an expense in the execution of the trust such reasonable sum as he may have paid to a surety company for becoming his surety, to be allowed by the court in which he was required to account. The court observed that there was a material difference between the qualities of the insurance afforded by indemnity companies and a private individual, who was usually the relative or friend of the principal or a 'professional bail-goer,' without responsibility. It is well known that lapse of time fluctuation in values of property, the uncertainty of human life, and the risk of a dishonest surety often render personal security inadequate when called upon to meet its promised responsibility These were doubtless some of the reasons which influenced the

legislature in requiring that the bond be executed by a surety company authorized to do business in this state.

"(2) The appellant relies upon *State ex rel.* v. *Robins*, 71 Ohio St. 273, 73 N. E. 470, 69 L. R. A. 427, 2 Ann. Cas. 485, where a statute requiring a similar bond was held to be in contravention of the Bill of Rights, in that it was an unconstitutional restriction upon the liberty to contract, and that it denied 'equal protection and benefit' in violation of the Constitution. It was conceded that the law was valid if the public welfare justified or required it; but it was argued that the surety bond does not increase the protection of the obligee. It was said:

" 'We have not been advised of any necessity for, or general demand for, the abolition of personal security and the substitution therefor of corporate security, and the reasons which we have given persuade us that the public welfare does not require it.' It was further remarked that it was evident to the court that it would be more economical for the public to become its own insurer of the good faith of its officials, which would result perhaps in no official bond in any case. We had supposed that under the Constitution the question as to whether the public welfare justified or required the state to exert its police power was a legislative question, and that ordinarily courts would not thwart the legislative will, if any reason existed or could be suggested for the exercise of the power. It is certain that personal sureties have frequently failed to respond to their obligations, and we must assume that the Legislature knew this fact and considered that the character of land under review would afford a safer and hence a better security to those who would be its beneficiaries. It would seem that the power to exact the security would include the right to determine the character and sufficiency of the security; that the greater power would include the lesser power. The presumption always obtains that a legislative act is constitutional, and it will only be held unconstitutional where it so plainly appears to be so as to free the mind from reasonable doubt. Guided by these principles, and for the reasons suggested, we are constrained to hold the law a valid exercise of the police power of the state."

See also *State* v. *Walter Bowen & Co.*, 86 Wash. 23, 149 Pac.

330, where the court, having the same question before it, held the bond requirement good. We quote from the syllabus:

> "1. Questions of the wisdom, necessity, and policy of law are solely for the Legislature, and if the Legislature proceeds regularly, violating no constitutional restriction, questions as to the necessity and policy of the law are conclusively determined in favor of the statute, if any state of facts could exist which would justify it."
>
> "3. Every presumption is in favor of the validity of a statute, and, until the contrary is shown beyond a reasonable doubt, a statute enacted in the exercise of the police power will not be overturned."

We quote also from the opinion as follows:

> "(5) Appellant insists that the requirement of the law, in order to obtain a license, that a surety company bond in the sum $3,000 be furnished, is an unreasonable and invalid requirement. It insists, also, that it is impossible of performance. The last contention is undoubtedly merely a conclusion or statement of opinion. We have heretfore held, in the case of *Ferguson-Hendrix Co.* v. *Fidelity & Deposit Co.*, 79 Wash. 528, 140 Pac. 700, that the provision of the law requiring such bond in order to obtain a license is a valid exercise of the police power of the state. It is urged however, that that question was not involved and was not proper to be decided in that case. *State ex rel. McKell* v. *Robins*, 71 Ohio St. 273, 73 N. E. 470, 69 L. R. A. 427, 2 Ann. Cas. 485, where a similar statute in Ohio was not sustained, is cited in support of appellant's contention. We cannot give our assent to the reasoning or the conclusion in that case: and, while it may be true that the validity of this section of the law was not involved in the Ferguson-Hendrix Case, *supra*, yet we adopt the reasoning in that case as supporting this provision of the law."

We see from these cases that it is almost universally held that the requirement of a bond does have a direct relation to the

promotion of the end to be reached by the exercise of the police power, and the requirement that such bond be executed by a surety company is in accord with practically all of the late decisions.

As was said in the case of *Mondou* v. *N. Y., N. H. & H. Ry. Co.*, 223 U. S. 1, 32 S. Ct. Rep. 169, in discussing the validity of certain acts of Congress making changes in the rules of liability of carriers:

> "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the basis of the right of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

Appellants complain that they were unable to comply with the requirements of the surety companies. Any surety, regardless of whether personal or corporate, if it affords any protection or strength to the bond, must necessarily require some proof of financial responsibility on the part of the principal. Counsel speaks of the possibility of obtaining personal surety, implying that the City, charged with the protection of its inhabitants, should assume a risk and accept a bond, which would not be considered good by a surety company, looking at it from a business standpoint. Surely the same persons if sufficiently interested to sign a bond, and if substantial and of any worth, should be able and willing to assist in procuring the bond for the principal from a surety company. Why should the City take all the risk? The evidence further showed that

these bonding companies take into consideration the moral risk, and it is a matter of common knowledge that there are numerous other things which they take into consideration which might enable one person to secure a bond over another, but these are matters over which the court has no control. The Court will take cognizance of the scores of bonding companies authorized to do business and operating within this state. The fact that one or more of them had shown their inability or unwillingness to make a bond, for reasons best known to themselves, is no evidence of the inability to secure a bond as required by the ordinance.

The real question in this case and the real underlying reason for the attack on the ordinance is disclosed by the testimony of the witness Knox L. Garvin, wherein he states that "We got as far as we could go with meeting the requirements of the City" (R. 59), and answered the following question:

"Q. And in your instance you think the main difficulty is because you are not able to qualify with a surety company that would write the bond, that that is why it operates to your detriment, don't you?

A. Yes, sir."

That this is not sufficient reason for holding the ordinance invalid has been determined time and time again not only by the courts of the various states but by the Supreme Court of the United States. *Hadfield* v. *Linden, supra; Ex parte Cardinal, supra, Dickie* v. *Davis, supra; Lutz* v. *New Orleans, supra; Packard* v. *Banton,* 264 U. S. 140.

"If as asserted the appellant is now unable to meet its re-

quirements because the character of the bond required by the act cannot be secured then he is not entitled to the privilege which the state grants, and this simply because the grant was conditioned upon a meeting of those requirements."

Hadfield v. *Linden, supra.*

"The fact that because of circumstances peculiar to him the appellant may be unable to comply with the requirement as to security without assuming a burden greater than that generally borne or excessive in itself does not militate against the constitutionality of the statute."

Packard v. *Banton,* 264 U. S. 140, 44 S. Ct. 257.

That there is difficulty in complying with the terms of an ordinance is not sufficient grounds for setting the ordinance aside, as was held in the recent case of *Standard Oil Co.* v. *City of Marysville,* 279 U. S. 582, 49 S. Ct. Rep. 430, where the court said:

"We may not test in the balance of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome." (Citing cases.).

See to the same effect *Hodge Drive It Yourself Company* v. *Cincinnatti,* 123 Ohio State, 284, 175 N. E. 196; 77 A. L. R. 889, where it was said:

"The fact, if it be a fact, that the peculiar circumstances of the plaintiffs are such that because thereof they have not the ability to comply with the provisions of the ordinance as to bond, does not militate against the validity of the ordinance so long as they have the same opportunity to comply with the ordinance that other members of the class have and the ordinance has for its reasonable purpose the preservation of the public safety, health, and welfare. *Auto Transit Co.* v. *City of Fort Worth* (Tex. Civ. App.) 182 S. W. 685; *Puget Sound*

Traction, Light & Power Co. v. *Grassmeyer,* 102 Wash. 482, 173 Pac. 504, L. R. A. 1918F, 469; *Hadfield* v. *Ludin, Pros. Atty.* 98 Wash. 657, 168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942."

This case was affirmed in the U. S. Supreme Court January 4, 1932, 284 U. S. 335, 52 Supreme Court Rep. 144.

Does the inability to meet the requirements of the surety companies in itself establish the unreasonableness of the ordinance? Assuredly not. The rates to be charged by those companies are subject to the supervision and control of the state: there is no indication any effort has been made to have such requirement modified by the proper board of the state, nor is there any complaint in this record that such requirements upon the part of the surety companies are unreasonable—that such companies should carry the risk without indemnification upon the part of the assured, or that the amount of indemnity required is at all out of proportion with the risk. The only complaint is that these appellants cannot meet such requirements.

It is further urged that the surety companies might impose such conditions upon applicants for bonds that drilling would be absolutely prohibited because of such conditions. However:

> "One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval."
>
> *Lehon* v. *City of Atlanta,* 242 U. S. 53, 37 S. Ct. 70.

There is a further contention urged by the appellees in the trial court which we believe to be controlling in this case.

The testimony and pleadings show that these appellants acting under the provisions of the 1923 Act, *supra* and of Ordinance 3944, and other sections of the zoning law, of which Ordinance No. 3944 is a part, in order to secure a permit to drill for oil and gas applied to the Building Commissioner of the City for such permit, and upon being refused a permit, appealed from such refusal to the Board of Adjustment, and submitted themselves to the jurisdiction of such Board, and to the provisions and requirements of the ordinances of the City and more particularly Ordinance No. 3944. After securing from the Board of Adjustment the right to secure a permit, which order is pleaded in their petition, they then attack, as unreasonable, one of the provisions of Ordinance No. 3944, the provision requiring the execution of the bond.

To permit such attack to be made is contrary to the rule of law governing estoppel. Appellants cannot avail themselves of the benefit of the statute and ordinance and then attack a portion thereof as unconstitutional.

We call the Court's attention to the case of *Ozones* v. *Corporation Commission*, 41 Fed. (2d) 799, where the plaintiff had made application for permits to build and operate gins under Section 3712 C. O. S. 1921, as amended by 1929 Session Laws, Chap. 240, Section 1, and, after receiving permits for several towns, attacked the constitutionality of the Act. Upon the plea of estoppel interposed by the defendants, which was sustained, the Court said:

> "One may not take advantage of law where it suits him and then attack it when it does not."

See also *Grand Rapids & I. R. Co.* v. *Osborn, Comr.*, 193 U. S. 17, 24 Sup. Ct. 310, where the Court said:

> "The railroad company, by incorporating under a general act, is estopped to contest the validity, under the federal constitution, of the provisions of that act regulating railroad rates, which formed one of the burdens attached by the statute to the privilege of becoming an incorporated body."

It could not be contended that the appellants did not receive benefits under this Act without contending that they had the inherent right to drill regardless of whether it was within the city limits and without regard to the City's right to regulate, and in spite of any regulatory requirements. Of course this contention could not be maintained.

It did not have such inherent right, and the permit to drill was only granted after an application was made to the Building Commissioner, and the Board of Adjustment, and an appeal from an adverse ruling of the Board to the District Court. This application was made under the ordinance and according to its terms, and when finally granted by the Board of Adjustment it was granted upon certain conditions contained in the ordinance, one of which was this requirement as to bond. Appellants contend that they have met all of the requirements of the ordinance except as to the bond. So we contend that the appellants applied for and secured the benefits of this ordinance and are now estopped from questioning the validity of the bond requirement, which was one of the burdens attached to the privilege of drilling for oil and gas within the city limits.

We call the Court's attention to the fact that this ordinance was first considered and passed by the City Council sitting as the legislative branch of the City government; that the ordinance was authorized by the statutes of the State of Oklahoma and the City Charter of Oklahoma City; that it was then attacked and upheld by the trial court, and then on two different appeals was upheld by the Supreme Court of the State of Oklahoma, and we now contend that its validity, thus established, is conclusive and binding on this point.

This is the effect of the holding of this Court in *Reinman* v. *City of Little Rock*, 237 U. S. 171, 35 Sup. Ct. Rep. 511. We quote from the opinion as follows:

> "The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purpose of our jurisdiction, as an act of legislation proceeding from the lawmaking power of the state; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution: and any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of Judicial Code, Section 237 (36 Stat. at L. 1156, Chap. 231, Comp. Stat. 1913, Sec. 1214), which confers jurisdiction upon this court *Atlantic Coast Line Ry. Co.* v. *Goldsboro*, 232 U. S. 548, 555, 58 L. ed. 721, 725, 34 Sup. Ct. Rep. 364, and cases cited."

See also *Thomas Cusack Co.* v. *City of Chicago*, 242 U. S. 526, 37 S. Ct. Rep. 190, 61 L. Ed. 472, L. R. A. 1918A:

> "(1) The decision of the highest court of a state that a certain municipal ordinance, challenged as repugnant to the Fed-

eral Constitution, is within the scope of the powers conferred by the state legislature upon a municipality, is conclusive upon the Federal Supreme Court on writ of error to the state court.

* * * * * *

"The Supreme Court of the State of Illinois sustained the validity of the ordinance in an opinion (267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916C 488) which declares that the act of the legislature of that state, passed in 1912 (Hurd's Stat. 1913, Chap. 24, Sec. 696), is a clear legislative declaration that the subject of billboard advertising shall be subject to municipal control.

"It is settled for this court by this decision that the ordinance assailed is within the scope of the power conferred on the City of Chicago by the legislature, that it is to be treated as proceeding from the lawmaking power of the state, and that, therefore, it is a valid ordinance unless the record shows it to be clearly unreasonable and arbitrary. *Reinman* v. *Little Rock*, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511."

See also *Armour* & *Co.* v. *State of North Dakota*, 240 U. S. 510, 36 S. Ct. Rep. 440, where the court, having under consideration a statute of the State of North Dakota, after the same had been upheld by the highest court of that State, and on passing upon its validity, said:

"The Supreme Court considered the statute as but a development of other laws passed in the exercise of the police power of the state to secure to its inhabitants pure food and honest weights, questions which the court thought were inseparably allied and any argument advanced upon one applies equally to the other.' And the court said the law was drafted by the Pure Food Commission, it might be reasonably assumed, 'after twelve years of observation and study,' and, further, that 'the expert who drafted the law, the legislature who passed it, and the governor who approved it, all thought necessity exist-

ed for such a measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief is founded upon the evidence in this case and upon facts of which this court can take judicial cognizance.'

"The court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not abitrary, we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however, strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws. *Rast* v. *Van Deman & L. Co. Tanner* v. *Little*, 240 U. S. 342, 60 L. ed.____, 36 Sup. St. Rep. 370, 379. It only remains to apply to the present case the principles so announced."

As heretofore stated herein, this appeal is from the decision of the Supreme Court of Oklahoma affirming the trial court's decision granting a permanent injunction. *Gant et al.* v. *Okla. City*, Reported in 15 Pac. (2d) 833. However, the identical question was passed upon by the Supreme Court of Oklahoma in its earlier opinion, passing upon the appeal from the trial court's order granting the City a temporary injunction. See *Gant* v. *Oklahoma City*, reported in 6 Pac. (2d) 1065.

Inasmuch as this earlier opinion of the Supreme Court deals much more fully with the issues involved, we desire to quote extensively from that opinion herein. A reading of that opinion will

disclose the fact that almost without exception the cases cited and relied upon by the appellants in their brief filed in this Court were relied upon and urged in their appeal before the Oklahoma Supreme Court, and that these cases were considered by that court and held either not to be applicable or not in point as affecting the validity of this particular section of the ordinance. We quote from the opinion as follows:

"KORNEGAY, J.

"This is a proceeding in error from the district court of Oklahoma County. Three district judges sat on the hearing, consisting of Judges Harve L. Melton, T. G. Chambers, and Lucius Babcock. The order complained of in the matter can be found at page 188 of the case made, and is as follows:

* * * * * *

"In this case, the city of Oklahoma City appears to be acting under a charter form of government. It was also a city when the Constitution of the State of Oklahoma was made. Its powers in these matters are largely affected by the provisions of the Constitution. By the Enabling Act, the laws in Oklahoma were extended over the state, until changed by the Constitution or other law making power of the state.

* * * * * *

"The ordinance in this case is lengthy, and the briefs have largely confined the discussion to certain phases of it. An examination of the cases cited under proposition 1 does not disclose that there is anything in them, that would warrant us in holding that the general police power of Oklahoma City to provide for the safety and health of its inhabitants, is in any way taken away by virtue of the jurisdiction conferred upon the corporation commission, to superintend the drilling for oil and gas, and their carrying and preservation.

"(3) Under proposition No. 2, the argument is that section 21 of Ordinance 3944 of Oklahoma City violates Section 1

of Article 14 of the Amendments to the Constitution of the United States, and Section 2 of Article 2 of the Constitution of the State of Oklahoma, and Section 7 of Article 2 of the Constitution of the State of Oklahoma, is therefore void.

* * * * * *

"The case of *Dobbins* v. *Los Angeles*, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169, is cited to the effect that the court has power to pass upon the reasonableness of the ordinance adopted by the city and the exercise of its power for the protection of its inhabitants. The case of *Lawton* v. *Steele*, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385, is cited, and a case from the Supreme Court of the State of Oklahoma, *Walcher* v. *First Presbyterian Church of Norman, Okla.*, 76 Okla. 9, 184 Pac. 106, 6 A. L. R. 1593, is cited with reference to unnecessary restrictions and the tendency of the ordinance to protect public health, morals, safety, or welfare. The case of *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, is cited, discussing the necessity of the legislative acts for inferior and municipal bodies being reasonable. Other cases cited are as follows: *Reagan* v. *Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014; *Hopkins* v. *Richmond*, 117 Va. 692, 86 S. E. 139, Anna Cas. 1917D, 1114; 19 R. C. L. par. 112, p. 305 and par. 113, p. 809; *City of Baltimore* v. *Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Walcher et al.* v. *First Presbyterian Church of Norman, supra; Holden* v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780; *Ex parte Throop*, 169, Cal. 93, 145 Pac. 1029; *Pennsylvania Coal Co.* v. *Mahon et al.*, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321; *Nectow* v. *City of Cambridge et al.*, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842; *Abbey Land & Improvement Co.* v. *San Mateo County*, 167 Cal. 434, 139 Pac. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804; *Continental Oil Co.* v. *City of Twin Falls, et al.*, 49 Idaho 89, 286 Pac. 353; *Youngstown* v. *Kahn*, 112 Ohio St. 654, 148 N. E. 842, 43 A. L. R. 662; *In re Gribben*, 5 Okla. 379, 47 Pac. 1074; *People* v. *Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A ,292; and the case of *Village of Terrace Park* v. *Errett et al.*, (C. C. A.) 12 F. (2d) 240. The case of *Re John Kelso*, 147 Cal. 609, 82 Pac. 241, 2 L. R.

A. (N. S.) 796, 109 Am. St. Rep. 178, and the case of *Pacific Palisades Association* v. *City of Huntington Beach*, 196 Cal. 211, 237 Pac. 538, 40 A. L. R. 782, are cited from California.

"Numerous extracts are taken from each of these cases, and it appears that there runs through them all the underlying principle embodied in the maxims, '*Sic utere tuo ut non laedas alienum*,' which, translated into modern phraseology, mean 'so use your own and not to hurt another.'

"The reply brief to the answer brief of defendants in error is largely a repetition of the matters set forth in the original brief, and cites similar authorities. Reference is made in the brief to the act of the Legislature of recent date allowing zoning and classification of areas and towns. We do not think that section of the statute was required in order to give to the governing power of the city of Oklahoma City the right to protect its own citizens from the encroachments of outsiders or encroachments of themselves.

"The constitution of Oklahoma provides in Section 10 of the Schedule for the continuation of the existence of municipal corporations such as Oklahoma City was. In the body of the Constitution, Section 2 of the Schedule provides as follows: 'Sec. 2. Oklahoma law in force. All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law. Section 3 (a) Art. 18, provides for special charters for city governments so long as their provisions are consistent with the laws of the state and subject to the Constitution. If additional power was necessary, it was in the power of the Legislature from time to time to confer it, as long as it is concerned with those matters of local self-government that from time immemorial have been conceded to belong to municipalities, which the general law making powers saw fit to confer. The case of *Ex parte Johnson*, 20 Okla. Cr. 66, 201 Pac. 533, dealt with a situation concerning the suppression of moving picture shows in the city of Bartles-

ville, and the opinion appears to sustain the syllabus, and the first three sections of the syllabus are as follows:

"'1. Within the limits prescribed by the Constitution and statute laws of this state, cities existing under a special charter form of government may have larger powers of self-government than are accorded to cities existing under general laws.

"'2. It is within the authority of the state, in the exercise of its police powers, to prohibit moving picture shows on Sunday; and such authority may be, by general law or by special charter, delegated to cities in the exercise of local self-government.

"'3. It is for the lawmaking body of a municipality or for the people themselves, in the exercise of the initiative and referendum, to determine, within the bounds of reason, the necessity or expediency of specific police regulations, subject only to the limitations prescribed by the Constitution and statutes of this state.'

"A decision (*Walton* v. *Donnelly*) dealing with the Oklahoma City Charter is found in the same volume (201 P.) at page 367 (83 Okla. 233), the first decision being by the Criminal Court of Appeals, the second one being by this court.

"With reference to those general provisions made by the Supreme authority for the protection of the lives and the health of the inhabitants of the municipality, there is a positive duty prescribed and a positive power conferred on the municipality; in fact, that is what it is organized for, as in a congested population there are so many matters calling for immediate action, and the situation changes so rapidly, that the Legislature, meeting every two years, could not effectually directly make the needed regulations. As applied to the present condition, it is conceded that the oil and gas wells in this case are within the corporate limits.

"The concern that we have here is whether or not the wells are within the limits of Oklahoma City, and whether or not they are of such a kind that their drilling should be regulated by the city commissioners.

"We must remember that Oklahoma is full of winds, and that the winds are variable. We also know that in this case there is evidence that the wells not far distant would produce as high as 86,000 barrels of oil a day. We also know that the gas pressure is enormous, and that the site of the well in this case is so near to the populous part of the city, that with a high wind and a break in the machinery, the well is liable to get out of control and scatter oil and gas over a large part of the city. As a property protection, the city was endowed with the power of regulation. But there is something far greater than property involved in this case; it is the safety of human life and health. On the other hand, there is at stake the chances of some men, joining with certain lot holders, who are trying to make a lot of money. We have on one side the people that want money and on the other side the people that want life, and its enjoyment in the home already provided.

"Complaint is made most bitterly that the requirement of a $200,000 bond is unreasonable and void. When one considers the amount that the oil well holder expects and the human lives that we know have recently been lost as a result of wild wells, the extra expense of furnishing some security for the benefit of the home owners is a very small factor. The cost of drilling the well is over $100,000, as we are informed. In the event wells within the corporate limits should become unmanageable, the stakes on the one side, as compared with the hope of profit on the other side, immediately throw the scales out of balance. If the well is a success, the full amount of the $200,000 bond would be the product of just a few days. If the well is a failure, the cost of the bond would not add more than 2 per cent to the cost of the experiment.

"It is further claimed that a personal bond is the only one that the small operator could possibly hope to get, and therefore it is an unjust discrimination. Viewed from the standpoint of the man who wants to make money, it might be. But this is not the case here. The case here is that some security for life and property of the people that built up the town is in the balance on the one side and profit is in the balance on the other side.

"We cannot see that the city ordinance, in requiring this $200,000 bond, is unreasonable, or unreasonable in requiring a surety, known to be solvent and subject to regulation by our laws. The three judges below thought the regulations reasonable. Nothing has been shown indicating the giving of this bond would in any manner interfere with the lawful rights of the plaintiff below. It may be their misfortune that they do do not get all they want, but the right of life and property, and to enjoy the gains of their own industry, is guaranteed to every person in the city of Oklahoma City, by the State Constitution. Considering its size and cost, and considering the probable profits, it is not unreasonable as compared to the property of others endangered. As compared to the hazard to human life, it is a bagatelle.

"The Supreme Court of the United States, time and again, reiterated the underlying principles. In the case of *New York & New England Railway Company* v. *Town of Bristol*, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 272, there is an enunciation of this doctrine by Mr. Chief Justice Fuller, and in the body of the opinion, 151 U. S. 567, 14 S. Ct. 440, 38 L. Ed. at page 272, the court says: 'It is likewise thoroughly established in this court that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power to self-protection cannot be contracted away, nor can the exercise of rights granted nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.'

* * * * * *

"We are further of the opinion that the regulation requiring the bond was a reasonable one. Complaint is made of the lower court's not allowing a supersedeas, staying the effect of this temporary injunction granted the city. That question is now largely moot, and is not argued. Our statute does not al-

low a supersedeas as a matter of right in a case of that sort, it being within the the sound discretion of the court.

"We therefore affirm the action of the lower court in denying the injunction in favor of the plaintiff below, and granting a temporary writ in favor of defendants in error. There are other provisions in the ordinance not here involved. The cost will be borne by the plaintiffs in error."

We submit that the court in that opinion conclusively answered every contention made by the appellants in this appeal, and that the decision of the Oklahoma Supreme Court is conclusive of the question here.

It will be noted from the evidence in this case, and particularly the evidence of the appellants' witness, Chas. K. Scruggs, that the same requirements were made by the bonding companies of all drilling and operating companies with regard to qualification for bonds, and indeed it is not claimed by the appellants that any favoritism was shown or that there was an arbitrary action upon the part of the City, or any of its officials, affecting this bond requirement, and, as was said in *Reinman* v. *City of Little Rock*, 237 U. S. 171, 35 S. Ct. Rep. 511:

"* * * and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws within the meaning of the 14th Amendment."

We submit that there is no testimony tending to show that the

ordinance in question is unreasonable in any degree, but giving the testimony the benefit of every assumption that could possibly be drawn, it can go no further than to say that it raises a question that is debatable, which, of course, is not sufficient to invalidate an ordinance.

> "Fairly debatable question as to reasonableness, wisdom and propriety of legislative action are not for determination of courts."
>
> *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 49 S. Ct. 430.

The court saying:

> "Where legislative action is within scope of police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for determination of courts but for that of legislative body on which rests the duty and responsibility of decision."

The Standard Oil Co. case has been cited and approved in a number of later cases on this proposition. See the recent case of *Fuller Brush Co.* v. *Town of Green River*, 60 Fed. (2d) 613, and cases cited.

See, to the same effect, the case of *Marblehead Land Co.* v. *City of Los Angeles*, 47 Fed. (2d) 528, from which we quote as follows:

> "3-5. The legislative body intrusted with the police power has a wide discretion which cannot be interfered with by the court. Their laws or ordinances enacted in pursuance of the police power are invested with a strong presumption of validity. If the question as to whether or not the legislation is unreasonable or arbitrary or an unequal exercise of power is fairly de-

batable, the legislation must be upheld as valid. *Zahn* v. *Board of Public Works*, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074, *supra*, and cases therein cited.

"6-17. The question for our consideration then is whether or not the reasonableness of the ordinance in question is fairly debatable. First, we will consider the matter with reference to the question of fire hazard. On the one hand it might be concluded that there was no substantial danger to adjoining property from the production of gas and oil upon appellants' land. This, however, depends upon the uncertain question as to the amount of gas and the pressure which would be developed therefrom by penetrating the oil or gas strata. It is a matter of common knowledge that in some cases oil wells, particularly in new territory, have gotten beyond control and resulted is disastrous fire. Such a well in the heart of a great city would be an intolerable nuisance, and it is conceded could be prohibited by the city council in the exercise of its police power. In an outlying and relatively unsettled district it is obvious that the fire hazard would be much less, if not entirely negligible. The city council presumptively acted upon the theory that such a hazard was real and substantial. The trial court, after hearing the evidence, held it to be a fact that the fire hazard was real and substantial. There is testimony to sustain this conclusion. The question then is whether this court, acting upon the evidence in the record to the contrary, and upon its general knowledge concerning production of oil, shall declare that the conclusions of the city council and of the trial judge are so arbitrary and unreasonable that they may be justly disregarded as determining the rights of the appellants. In this connection it should be observed that, in passing upon the conclusions of the trial court, or the local legislative body, the appellate court should give great weight to the determination of local authorities and the local courts especially familiar as they are with local conditions. *Welch* v. *Swasey*, 214 U. S. 91, 106, 29 S. Ct. 567, 53 L. Ed. 923; *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365, 30 S Ct. 301, 54 L. Ed. 515; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144, 34 S. Ct. 281, 58 L. Ed. 539.

"8. From the foregoing it would appear that the very least that could be said in favor of the validity of the ordinance is that the question of fire hazard resulting from mining operations is debatable, the diffusion of noxious and offensive gases into the surrounding dwellings is established by uncontradicted testimony, the utility of the appellants' land for residence purposes is thoroughly established and conceded, the trend of the residence district of the city toward and about the land in question is undeniable, and therefore the court is precluded from inquiring into the validity of an ordinance avowedly within the police power of the city, if not arbitrary, unreasonable, and unequal."

It has been held time without number that the court will not substitute its judgement for the judgment of the Legislature in matters of this character. See *Otis & Gassman* v. *Parker*, 187 U. S. 606, 23 S. Ct. Rep. 168, where the court said:

" * * * But general propositions do not carry us far. While the the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*

"Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of people concerned as to that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that

an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is clear unmistakable infringement of rights secured by the fundamental law.' *Booth* v. *Illinois*, 184 U. S. 425, 429, 46 L. Ed. 623, 626, 22 Sup. Ct. Rep. 425, 427. * * *"

See a good expression to the same effect from the Supreme Court of California in *Zahn* v. *Board of Public Works* (Calif.) 234 Pac. 388, at 395:

"In *Miller* v. *Board of Public Works*, *supra*, it was said: 'That courts are loathe to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * * Every intendment is to be indulged by the courts in favor of the validity of its exercise, and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts'."

It has been repeatedly held that the burden rests upon the appellants to overcome a statute or ordinance and that all doubts must be resolved in favor of its validity. See *Champlin Refining Co.* v. *Corporation Commission*, 51 Fed. (2d) 823, where it was said:

"(1, 2) We observe at the outset that the burden rests upon the plaintiff to establish that the statute infringes, the constitutional guaranties which it invokes, and if the statute is susceptible of a construction which conforms to constitutional requirement, doubts must be resolved in favor of and not against the state. *Toombs* v. *Citizens Bank of Waynesboro*, 281 U. S. 643,

647, 50 S. Ct. 434, 75 L. Ed. 1088; *United States Airways* v. *Shaw* (D. C.) 43 F. (2d) 148, 150."

This decision of the United States District Court for the Western District of Oklahoma was affirmed in this Court May 16, 1932. See *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 52 S. Ct. Rep. 559.

Police regulations often injure property rights but this is no argument against their enforcement, as has been shown by the cases heretofore cited and relied upon.

See also:

City of Youngstown v. *Kahn Bros. supra;*
Zahn v. *Board of Public Works*, (Cal.) *supra;*
Miller v. *Board of Public Works*, (Cal.) *supra;*
Marblehead Land Co. v. *City of Los Angeles. supra.*

The appellants would emphasize the fact that the location of this well had been used as the dump grounds of the City before the attempted development for oil, and for that reason any regulation as to drilling upon it would be unjustified. However, we call attention to the evidence which shows that this location was about one mile from the City Hall or business center of the City, and that while there were not many houses in the immediate vicinity of the well, that it was built up to the north and west with valuable wholesale and industrial buildings, and that two of the railroad passenger stations were between the location and the City Hall. The evidence further showed that the prevailing winds were from the south and east and that on account of the high pressure in this field wells

sprayed oil for distance of about two miles. It would be hard to imagine the amount of damage, should a well at this location get out of control and run wild, or get on fire. A whole city could be wiped out over night. Certainly the authorities of the City were justified in taking every precaution to regulate drilling within the city limits and to pass this bond provision, which, as we have seen from the authorities, does have a direct relation to the enforcement of precautionary measures and safety regulations.

The right to legislate with reference to regulating the oil industry and the drilling of wells cannot be questioned in view of the following listed authorities:

Herkness v. *Irion*, 11 Fed. (2d) 386;
Winkler v. *Anderson* (Kan.) 177 Pac. 521, 3 A. L. R. 268;
Oxford Oil Co. v. *Atlantic Oil & Producing Co.*, 16 Fed. (2d) 639; Affirmed in 22 Fed. (2d) 579;
Marrs v. *City of Oxford*, 24 Fed. (2d) 541; Affirmed in 32 Fed. (2d) 134;
Ohio Oil Co. v. *Indiana*, 20 S. Ct. Rep. 576, 177 U. S. 190;
C. C. Julian Oil & Royalties Co. v. *Capshaw*, 145 Okla. 237, 292 Pac. 841;
Champlin Refining Co. v. *Corporation Commission of Oklahoma*, 51 Fed. (2d) 823; Affirmed 52 S. Ct. Rep. 559; 286 U. S. 210;
Marblehead Land Co. v. *City of Los Angeles*, 36 Fed. (2d) 242; Affirmed in 47 Fed. (2d) 528;
Helmerich & Payne v. *Roxanna Petroleum Corp.* (Kans.) 14 Pac. (2d) 663.

The case of *Marrs* v. *City of Oxford*, cited above, is a very instructive case on the construction of an ordinance of the City of Ox-

ford after which the Oklahoma City ordinance was modeled in many respects. The Oxford ordinance is set out in 32 Fed. Reporter, at page 136, and it will be noted that the bond provisions, as shown by Section 7 thereof, are very similar to the bond provisions of the Oklahoma City ordinance with reference to the furnishing of bond signed by "a surety company authorized to do business in the State of Kansas". That provision of the ordinance was not particularly attacked in that case, but the general provisions of the ordinance in relation to its regulations of oil drilling were sustained. *The Helmerich & Payne* case, *supra*, is a recent decision from the Supreme Court of Kansas upholding the same ordinance.

We submit under the authority shown in the cases cited, that the judgment of the Supreme Court of the State of Oklahoma should be affirmed, and that the Court will be justified in saying of the ordinance in question, as was said by Mr. Justice Clark, in his opinion in the *Thomas Cusack Co.*, case, *supra*:

> "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with *Armour & Co. v. North Dakota*, 240 U. S. 510, 514, 60 L. Ed. 771, 775, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content ourselves with saying that, while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is ap-

proved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 3-, 49, L. ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Anna. Cas. 765. And this, for the reasons stated, cannot be said of the ordinance which we have here."

Consequently, we submit the case in confidence, believing that the judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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